82-415

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No.

In the Supreme Court of the United States

October Term, 1982

John N. Robinson,
Petitioner

vs.

George J. Magovern,
Cardiothoracic Surgical Associates, Inc.,
and Allegheny General Hospital,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AT NO. 81-2726

Petition For Writ of Certiorari And Appendix

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The petitioner, John N. Robinson, respectfully prays that a writ of certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit entered in this proceeding on May 11, 1982.

QUESTIONS PRESENTED FOR REVIEW

I. Is the crime-fraud exception to the attorney-client privilege applicable to torts involving moral turpitude other than civil fraud?

II. Can the crime-fraud exception to the attorney-client privilege be invoked solely on the basis of the communications themselves or must independent evidence of wrongdoing first be established?

III. Can documentary evidence be work product if it is prepared contemporaneously with the alleged wrongdoing and is directly at issue in the litigation?

IV. Can disclosure of an attorney's mental impressions, conclusions, opinions or legal theories be compelled upon a showing of uniqueness and overwhelming need?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the respondents set forth in the caption, petitioner's Complaint named twenty-six (26) individuals[1] as defendants, both individually and as Trustees of respondent, Allegheny General Hospital. The claims against those defendants are abandoned in this Petition.

---

[1]Henry G. Allyn, Jr., Gay E. Bodick, Fred Brand, Jr., Henry Chalfant, Ronald R. Davenport, Harry Edelman, III, Harry M. Epstine, William H. Genge, W. H. Krome George, R. Burt Gookin, Thomas C. Graham, Kenneth C. Hewitt, John A. Huffman, Jr., B. F. Jones, III, Bernard H. Jones, Caryl M. Kline, Richard K. Means, Francis B. Nimick, David B. Oliver, II, Robert B. Pease, G. Harton Singer, III, Elizabeth A. Smith, W. P. Snyder, III, Leonard A. Swanson, W. Bruce Thomas and Paul H. Weyrauch.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS BELOW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS OF THE COURTS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. Basis For Federal Jurisdiction In District Court 2

B. Statement of Facts 2

REASONS FOR GRANTING THE WRIT 8

I. The Applicability of The Crime-Fraud Exception To The Attorney-Client Privilege To Torts Other Than Fraud And The Preliminary Showing Necessary To Invoke The Exception Have Generated Conflicting Decisions From The Courts Of Appeal And Are Important, Recurring Questions Of Federal Law Which Should Be Settled By This Court 9

II. Whether Work Product Can Be Documentary Evidence Directly Involved In The Litigation And The Showing, If Any, Sufficient To Justify Disclosure Of An Attorney's Mental Impressions, Conclusions, Opinions Or Legal Theories Are Important Questions Of Federal Law Which Should Be Settled By This Court 13

CONCLUSION 17

APPENDIX

TABLE OF AUTHORITIES

CASES

Page

Arizona v. Maricopa County Medical Society, 102 S. Ct. 2466 (1982) 7

Clark v. United States, 289 U.S. 1 (1933) 9,11

Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926 (N.D. Cal. 1976) 15

Hickman v. Taylor, 329 U.S. 495 (1947) 13

In re Berkley & Co., Inc., 629 F.2d 548 (8th Cir. 1980) 12

In re Grand Jury Investigation (Sun), 599 F.2d 1224 (3rd Cir. 1979) 16

In re Grand Jury Proceedings, 473 F.2d 840 (8th Cir. 1973) 16

In re Grand Jury Proceedings (FMC), 604 F.2d 798 (3rd Cir. 1979) 11, 12

In re Murphy, 560 F.2d 326 (8th Cir. 1977) 11

In re Sawyer's Petition, 229 F.2d 805 (7th Cir.), *cert. denied*, 351 U.S. 966 (1956) 11

In re Sealed Case, 676 F.2d 793 (D.C. Cir. 1982) . 8, 11, 12

Kearney & Trecker Corp. v. Giddings & Lewis, Inc., 296 F. Supp. 979 (E.D. Wis. 1969) 15

Kirkland v. Morton Salt Co., 46 F.R.D. 28 (N.D. Ga. 1968) 15

Union Camp Corporation v. Lewis, 385 F.2d 143 (4th Cir. 1967) 12

United States v. Bob, 106 F.2d 37 (2nd Cir.), *cert. denied*, 308 U.S. 589 (1939) 12

United States v. Mardian, 546 F.2d 973 (D.C. Cir. 1976) 11

United States v. Shewfelt, 455 F.2d 836 (9th Cir.), *cert. denied*, 406 U.S. 944 (1972) 12

United States v. United Shoe Machinery Corporation, 89 F. Supp. 357 (D. Mass. 1950) 10

Upjohn v. United States, 449 U.S. 383 (1981) 16, 17

Page

CONSTITUTIONAL PROVISIONS

United States Constitution
Fifth Amendment 2
Fourteenth Amendment 2

STATUTES

Civil Rights Act of 1871
42 U.S.C. §1983 2

Clayton Act
15 U.S.C. §15 2
15 U.S.C.§26 2

Sherman Act
15 U.S.C. §1 ..... 2, 4, 7, 8, 11
15 U.S.C. §2 ..... 2, 4, 7, 9, 11

28 U.S.C. §1254(1) 1
§1331 2
§1337 2
§1343 2

RULES

Federal Rules of Evidence
Rule 501 ..... 1, 10
Rule 503 (d) (1) [Proposed by Supreme Court] . 10, 12

Federal Rules of Civil Procedure
Rule 26 (b) (3) 1, 13
Rule 41 (b) 7, 13

Uniform Rules of Evidence
Rule 26(a) [1953 version] 10
Rule 502(d) (1) [1974 version] 10

TEXTBOOKS

4 Moore's Federal Practice, ¶26.63[1] 15

8 Wigmore, *Evidence* (McNaughton Rev. 1961), §2298 .. 11

OPINIONS OF THE COURTS BELOW

No opinion was rendered by the United States Court of Appeals for the Third Circuit. The 193-page Opinion of the United States District Court for the Western District of Pennsylvania, dated August 31, 1981 and accompanying its judgment order, is reported at 521 F. Supp. 842. An earlier Opinion of the District Court, dated September 12, 1978, is reported at 456 F. Supp. 1000. Those opinions, as well as two other unreported opinions, dated November 6, 1978 and April 11, 1980, appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was dated and entered on May 11, 1982. A timely petition for rehearing and suggestion of rehearing *en banc* was denied on June 15, 1982. This petition for certiorari is filed within ninety days of that date. Jurisdiction of this Court is invoked under 25 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 501 of the Federal Rules of Evidence provides as follows:

> "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law."

Rule 26(b)(3) of the Federal Rules of Civil Procedure provides pertinently as follows:

"(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule [relating to experts] a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule [general] and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

STATEMENT OF THE CASE

A. Basis For Federal Jurisdiction in District Court

This is an action against a physician, the private practice professional association of which he is the principal member, and a hospital for injunctive relief and damages suffered as a result of defendants' violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2), Sections 4 and 16 of the Clayton Act (15 U.S.C. §§15 and 26), the Civil Rights Act of 1871 (42 U.S.C. §1903), and the Fifth and Fourteenth Amendments to the United States Constitution. Original jurisdiction was vested in the District Court under 28 U.S.C. §§1331, 1337 and 1343.[2]

B. Statement Of Facts

Petitioner, John N. Robinson ("Robinson"), is a highly skilled, board certified (General and Thoracic Surgery), cardiothoracic (open heart) surgeon. He received extensive, pro-

[2]As hereinafter discussed, the only claims still pursued by petitioner are those involving conspiracy based upon Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2) and their jurisdictional counterpart, 28 U.S.C. §1337.

fessional training at such respected institutions as the Harvard Surgical Service at Boston City Hospital, Columbia Presbyterian Hospital in New York City, and the Texas Heart Institute in Houston. Included among his mentors were the well-known Drs. Michael DeBakey, Grady Hallman, and Denton Cooley. Since completion of his training in 1971, Robinson has engaged in a private medical practice in the Western Pennsylvania area.

Respondent, Allegheny General Hospital ("AGH"), is a 726-bed, regional referral, teaching hospital located in Pittsburgh, Pennsylvania. By virtue of its ownership of a heart-lung machine, AGH is one of only seven (7) hospitals in Western Pennsylvania with the capability to perform open heart surgery.

Respondent, George Magovern ("Magovern") and his highly successful, 5-member, private practice professional association, respondent, Cardiothoracic Surgical Associates, Inc. ("CTSA"), dominate the open heart surgical practice at AGH. During the period here involved, CTSA performed virtually all (at least 95%) of such procedures at AGH and, as a group, was the Hospital's leading revenue producer (A.11a). In *1976*, the compensation of CTSA's members (including profit sharing payments) was approximately $1.1 million.

In addition to his substantial private surgical practice, Magovern was, *inter alia*, Director of the Department of Surgery and head of the Division of Thoracic Surgery at AGH. In those capacities, he wielded power commensurate with his titles.

In February, 1975, desiring to expand the scope of his open heart surgery, referral practice, Robinson requested an application for staff privileges at AGH, but was unable to obtain one.[3] Still without an application and sensing a lack of cooperation, which was underscored by Magovern's comments at an AGH-directed interview, Robinson requested his attorney, in August of 1975, to write a letter to AGH to secure an application. That letter concluded with the following:

[3]Robinson's request was oral, which complied with AGH's bylaws.

"If, of course, I do not receive an indication from you of a desire to resolve this problem within the next 15 days, I will have no further choice but to institute appropriate legal proceedings for the benefit of Dr. Robinson." (A.34a).

In response, Robinson was sent an application, which was completed and submitted by him in late September. There then followed a year's sequence of procedural steps to process the application intended, at least superficially, to comply with the AGH bylaws. These included the gathering of references, Magovern's submission to the Credentials Committee of his Departmental Director's Report recommending denial, similar action by the Credentials Committee, affirmation by the Executive Committee of the Medical Staff, a hearing before the Executive Committee, and final disapproval of the application by the Board of Trustees on October 25, 1976.

On January 20, 1977, Robinson filed his Complaint alleging that the denial of his staff privilege application was the result, *inter alia*, of a group boycott constituting a *per se* violation of Section 1 and of a conspiracy to monopolize under Section 2 of the Sherman Act.[4] The unlawful conduct was alleged to have occurred during the period commencing with Robinson's initial request for an application (February, 1975) and concluding with his final rejection by the Board of Trustees (October, 1976).

During the course of discovery, AGH and Magovern objected to the production of certain documents, alleging the attorney-client and/or work product privileges. The matter was initially reviewed by a United States Magistrate and then was submitted *de novo* to Judge Daniel J. Snyder. By Orders dated April 11 and 22, 1980, the Court upheld the privilege claims to the following five (5) documents, all generated during the alleged conspiracy period and exchanged among Magovern, AGH's general counsel (Harold Blaxter), Vice-President

[4]Other claims asserted included violations of equal protection and due process, federal contractual duties, monopolization and attempted monopolization under Section 2 of the Sherman Act, and pendent state law claims. By Opinion and Order, dated September 12, 1978, the District Court granted a partial summary judgment and dismissed Robinson's constitutional, civil rights and federal contractual claims. It was held, pertinently, that AGH's conduct did not constitute "state action".

(Harold Sanders), Credentials Committee Chairman (Dr. John Feist), and supervisor of nursing services and operating rooms (Richard W. Ashton):[5]

1. A handwritten memorandum, dated September 16, 1975, from Sanders to Magovern, stating as follows:

"George—

as a follow up—Harold Blaxter advised that application and related materials had to be sent to Dr. Robinson, and advised that a copy should also go to Mrs. Litman [Robinson's counsel] as indicated herein. I've asked that all outside contact on this be referred to me by people in this area.

Hal"

2. A memorandum, dated November 26, 1975, from Ashton to Sanders, containing statistics and advising that the Hospital could accommodate Robinson, were his application accepted.

3. A letter, dated January 22, 1976, from Blaxter to Feist, with a copy to Magovern and a blind copy to Sanders, containing opinions and legal theories supporting dismissal of Robinson's application, and concluding with the following P.S. to Magovern:

"I think your January 20 letter is great. With your permission I would like to use it as the basis for a suggested re-draft of the Departmental Director's Report."

4. A letter, dated January 27, 1976, from Blaxter to Magovern, with a copy to Sanders, summarizing the clinical and admitting privileges sought by Robinson and the reasons to deny his application; and

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[5]Because the Court in part reversed the Magistrate's initial decision, pursuant to which two of the documents and a portion of a third were produced, Robinson knows their contents precisely. As to the remainder, which have never been produced, he can only venture an educated guess as to their contents on the basis of affidavits submitted to the District Court and furnished in edited form to Robinson's counsel.

5. A letter, dated May 25, 1976, from Magovern to Blaxter, advising that he doesn't like Blaxter's letter to Attorney Litman; it is too acquiescent; a medical person should be conducting the Credentials Committee hearing; and anyone with psychiatric problems or aberrant behavior, which are traits exhibited by Robinson, should be weeded out from the potential candidates.

The Court ruled that document No. 1 was protected under the attorney-client privilege and that the other four (4) documents were work product, prepared in anticipation of litigation, as well as attorney-client communications.[6] As to work product, the Court held that because the documents contained counsel's mental impressions, opinions and legal theories, they were absolutely protected. Addressing Robinson's argument that the "crime-fraud" exception defeated both privileges, the Court held that:

> "Although AGH was advised by counsel during the application process and thereafter rendered an adverse decision, this is insufficient to establish that the attorney's advice was sought or given in furtherance of a crime or tort. Plaintiff has not offered any evidence which would so indicate. The party seeking disclosure 'must make out a prima facie case that the attorney was used in order to promote an intended, continuing criminal or fraudulent activity.' (citing cases)." (A.179a)

Following the sudden death of Judge Snyder on the day prior to the scheduled commencement of trial, the case was reassigned to the Honorable Maurice B. Cohill, Jr., and began, non-jury, on May 27, 1980. At the conclusion of his case-in-chief, Robinson attempted to enforce a subpoena *duces tecum* and to introduce the so-called privileged documents. Judge Cohill summarily ruled as follows:

> "I am not going to open Judge Snyder's book. Anything Judge Snyder ruled, we will continue that ruling."

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[6]Ashton, however, did not become an attorney and AGH's in-house counsel until well *after* his November 26, 1975 memorandum.

Immediately thereafter, the District Court denied respondents' Motions For Involuntary Dismissal pursuant to F. R. Civ. P. 41(b).

The ten-week trial concluded in September of 1980. On August 31, 1981, the District Court filed its 193-page Opinion and Judgment Order, ruling against Robinson on all theories and entering judgment for respondents. With respect to the claims that respondents' actions in denying staff privileges to Robinson violated Sections 1 and 2 of the Sherman Act, the two conspiracy theories pursued herein, the District Court made the following two critical rulings: (1) AGH, on the one hand, and CTSA and Magovern, on the other, had separate, identifiable interests in the Robinson application and were capable of conspiring to deny that application (A.108-110a); and (2) if a conspiracy existed to exclude a potential competitor from obtaining staff privileges, it constituted a group boycott with horizontal effects (A.109a). The Court held, however, that neither the intent nor agreement necessary to prove the conspiracy claims had been established (A.83-103a). [7]

On appeal, Robinson argued that the District Court's failure to find conspiracy and intent was clearly erroneous and that exclusion of the above-described five (5) documents as privileged was error.[8] As to the former, Robinson pointed, *inter alia*, to: (a) respondents' pre-trial spoliation of evidence, *i.e.* by "whiting-out" indications on the originals that copies of documents had been sent to Magovern; (b) Magovern's pervasive intrusion into and manipulation of Robinson's application process, which exceeded both his normal role and that called for by AGH's bylaws; (c) respondents' withholding from the Credentials Committee of substantial evidence favorable to Robinson; and (d) the capricious use of the admission standards (*e.g.* at precisely the same time Robinson was told that a

[7] This Court's recent ruling in *Arizona v. Maricopa County Medical Society*, 102 S. Ct. 2466 (1982) strongly suggests that proof of intent and conspiracy would have established a *per se* violation of Section 1.

[8] Robinson also argued a third issue, *to-wit*, that pervasive governmental involvement in AGH's operation renders its conduct "state action" and, therefore, that the grant of summary judgment on the constitutional and civil rights claims had been improper. This issue has been abandoned.

shortage of operating room time and space was fatal to his application, a new member of CTSA was accepted on staff).

By Judgment Order dated May 11, 1982, a panel of the Court of Appeals for the Third Circuit affirmed and, on June 15, 1982, the Court *en banc* denied Robinson's timely petition for rehearing. By this Petition, Robinson does not seek review by the Supreme Court of the voluminous record below related to conspiracy and intent. He does urge that the exclusion of the so-called "privileged" documents was material and reversible error and compels a remand for further proceedings.

REASONS FOR GRANTING THE WRIT

As an outgrowth of our society's increasing legalization, the role of the attorney has been altered dramatically. Formerly called upon only to pick up the pieces, he has become a vital cog in the policy-making machinery itself. Virtually every decision, from the seemingly routine to the incredibly complex, is deferred pending input from counsel. That advice, either intentionally or unintentionally, is sometimes ill-conceived.

When litigation ensues, the applicability *vel non* of the attorney-client and work product privileges inevitably must be confronted. As Judge Wright recently observed:

> "Each of the recognized privileges protects a substantial individual interest or a relationship in which society has an interest, at the expense of the public interest in the search for truth.... Competent authority must determine that a privilege is necessary in a particular context to protect that which society seeks to protect, and that the benefits of protecting the privileged interests outweigh the benefits of getting at the truth." *In Re Sealed Case*, 676 F.2d 793, 806 (D.C. Cir. 1982) (footnote omitted).

In the instant case, Robinson represents a growing number of physicians complaining of their arbitrary exclusion from a hospital's medical staff. The decision on his application, however, was not a unilateral one by AGH. Rather, it was actively influenced and orchestrated by direct competitors (Magovern and CTSA), who monopolized the practice of open heart surgery at AGH. Their actions, therefore, constitute both a group boycott in violation of Section 1 of the Sherman Act and a conspiracy to monopolize open heart surgery at AGH in

violation of Section 2 of that Act. As reflected by the contents of the excluded documents and their dates, AGH's corporate counsel played a major role in effecting these violations.

This Court is thus presented with an opportunity to define the parameters of the attorney-client and work product privileges, where an attorney's complicity in unlawful conduct is clearly demonstrated. The evidence herein sought relates directly to respondents' conspiratorial activities and intent, the elements of Robinson's group boycott and conspiracy to monopolize claims held by the District Court to be lacking. Because this subjective evidence is incapable of duplication, Robinson's need is overwhelming and its exclusion effectively frustrates the "public search for truth".

I. The Applicability Of The Crime-Fraud Exception To The Attorney-Client Privilege To Torts Other Than Fraud And The Preliminary Showing Necessary To Invoke The Exception Have Generated Conflicting Decisions From The Courts Of Appeal And Are Important, Recurring Questions Of Federal Law Which Should Be Settled By This Court.

The crime-fraud exception to the attorney-client privilege, now universally accepted in principle, traces its genesis in this country to dictum of the Supreme Court in *Clark v. United States*, 289 U.S. 1 (1933). Addressing the secrecy of jury deliberations, Justice Cardozo analogized that privilege to the common law protection afforded attorney-client communications:

> "There is a privilege protecting communications between attorney and client. The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told.... To drive the privilege away, there must be 'something to give colour to the charge'; there must be 'prima facie evidence that it has some foundation in fact.'" 289 U.S. at 15 (citations omitted).

During the succeeding 50 years, while the lower federal courts have applied the rule generally in literally hundreds of

cases, this Court has never had occasion to focus on the precise scope of the exception. Its indirect attempt, through codification of the rules of privilege, was frustrated by Congress. Rule 503(d) (1) of the Federal Rules of Evidence, as promulgated by this Court in November, 1972, provided that:

> "(d) There is no privilege under this rule:
>
> (1) Furtherance of crime or fraud. —If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud."

The Rules of Evidence, as finally enacted by Congress two years later, eliminated the Supreme Court's specific recommendations (including that related to the crime-fraud exception), substituting therefor a general principle that all evidentiary privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." F.R. Ev. 501.

"Reason and experience" has generated two extremely troublesome problems in the application of the crime-fraud exception, both of which are squarely presented by this case. *First*, does the exception apply only to the technical tort of fraud, or does it extend as well to other torts involving dishonesty or specific intent? *Second*, is a *prima facie* showing of the on-going or contemplated wrong, independent of the communications themselves, required to invoke the exception?

As to the former, Judge Wyzanski's classic definition of the attorney-client privilege in *United States v. United Shoe Machinery Corporation*, 89 F. Supp. 357, 358 (D. Mass. 1950) excludes protection for communications intended for the purpose "of committing a crime or *tort*." A similar approach was adopted in Rule 26(a) of the original (1953) Uniform Rules of Evidence. On the other hand, the revised (1974) Uniform Rules narrow the exception to fraud (Rule 502(d) (1)) and the Supreme Court's proposed Rule of Evidence 503(d) (1), quoted above, provided likewise.

The codifiers' division on this issue is reflected in a conflict among the Courts of Appeal. The D.C. and Third Circuits have apparently opted for the more expansive application, while other Circuits have at least expressed the principle according to the narrower formulation. See, *e.g. In re Sealed Case, supra; In re Grand Jury Proceedings (FMC)*, 604 F.2d 798 (3rd Cir. 1979); *In re Murphy*, 560 F.2d 326 (8th Cir. 1977); *In re Sawyer's Petition*, 229 F.2d 805 (7th Cir.), *cert. denied*, 351 U.S. 966 (1956). But see, *United States v. Mardian*, 546 F.2d 973 (D.C. Cir. 1976).

The instant case adds credence to Professor Wigmore's observation that:

> "[I]t is difficult to see how any moral line can properly be drawn at that crude boundary [i.e. civil fraud], or how the law can protect a deliberate plan to defy the law and oust another person of his rights, whatever the precise nature of those rights may be." 8 Wigmore, *Evidence* (McNaughton Rev. 1961), §2298.

Intrinsically, respondents' alleged conspiracy in restraint of trade and/or to monopolize combines elements both of a crime (see, 15 U.S.C. §§1 and 2) and of a fraud, but fits the classic definition of neither. By the same token, a civil rights violation would not activate the crime-fraud exception under the narrower standard. Yet, the principles underlying the privilege and its exception, as well as the public policy supporting the statutory torts themselves, cry out for disclosure at least as much as where, for example, the wrong asserted is a securities fraud. Robinson believes that this Court may properly, and without overextending the exception, adopt Professor Wigmore's position that it applies to any "civil wrong involving moral turpitude" or Judge Wright's formulation of a fraud "or other type of misconduct fundamentally inconsistent with the basic premises of the adversary system." *In re Sealed Case, supra*, 676 F.2d at 812.

This case also squarely presents the recurring question of the burden of proof necessary to invoke the crime-fraud exception. Once again, decisions from the Courts of Appeal are conflicting. Following Justice Cardozo's lead in *Clark v.*

United States, supra, the Third and many other Circuits have held that a *prima facie* showing of illegality, independent of the documents themselves, is required before the attorney-client privilege is to be swept away and the communications admitted into evidence. *In re Grand Jury Proceedings (FMC), supra.* See also, *e.g. United States v. Shewfelt,* 455 F.2d 836 (9th Cir.), *cert. denied,* 406 U.S. 944 (1972); *Union Camp Corporation v. Lewis,* 385 F.2d 143 (4th Cir. 1967); *United States v. Bob,* 106 F.2d 37 (2nd Cir.), *cert. denied,* 308 U.S. 589 (1939). On the other hand, the D.C. and Eighth Circuits have held that *in camera* inspection of the documents themselves is a sufficient means of establishing the requisite nexus between the legal advice and illegal activity. *In re Sealed Case, supra; In re Berkley & Co., Inc.,* 629 F.2d 548, 553 (8th Cir. 1980), ftn. 9. The Advisory Committee's Note to the Supreme Court's proposed Rule 503(d)(1) is in accord with the latter positon:

> "No preliminary finding that sufficient evidence aside from the communication has been introduced to warrant a finding that the services were sought to enable the commission of a wrong is required."

In the instant case, relying on *In re Grand Jury Proceedings (FMC), supra,* the District Court, when ruling on the privilege question prior to trial, required the more stringent standard of independent proof. Mere inspection of the documents, by contrast, would have satisfied the Court of their probative value and of the conspiratorial and illegal nature of the underlying attorney-client relationship. They reflect that:

a. Magovern and AGH personnel were discussing how to withhold even an application form from Robinson (No. 1).

b. Presumably (based upon respondents' affidavits), AGH's nursing and operating room supervisor was advising the alleged co-conspirators that the operating room schedule did not preclude participation by Robinson (No. 2). This position, which directly contradicts Magovern's reason for recommending denial and the one publicly and officially adopted by AGH, supports Robinson's contention that that asserted basis for his rejection was mere pretense.

c. Counsel, Magovern and others were collectively preempting and predetermining the independent consideration of Robinson's application through the review process mandated by AGH's bylaws (Nos. 3, 4 and 5). Specifically, AGH was conducting legal research to support Magovern's theories for rejection even prior to committee review (Nos. 3 and 4); AGH acquiesced in Magovern's threat to impose his own sanctions against AGH, if his position was not supported (No. 3); and Magovern continued to exert pressure long after his role prescribed by the bylaws should have ceased (No. 5).

Significantly, even under its own standard, *i.e.* independent proof, the District Court erred at trial by sustaining respondents' claim of attorney-client privilege. Judge Snyder's original ruling was made during the discovery stages of the case. Any insufficiency in Robinson's position at that time was rectified by the time he concluded his case-in-chief at trial and attempted to enforce a subpoena *duces tecum* for the disputed documents. Contemporaneously with the trial judge's refusal "to open Judge Snyder's book", he denied respondents' Motion For Involuntary Dismissal pursuant to F. R. Civ. P. 41(b). A *prima facie* case of illegality, therefore, had clearly been established.

The crime-fraud exception to attorney-client privilege is an important component of the Federal Rules of Evidence. The recurring conflicts described relating to the scope and activation of the exception justify the grant of certiorari to review the judgment below.

II. Whether Work Product Can Be Documentary Evidence Directly Involved In The Litigation And The Showing, If Any, Sufficient To Justify Disclosure Of An Attorney's Mental Impressions, Conclusions, Opinions Or Legal Theories Are Important Questions of Federal Law Which Should Be Settled By This Court.

F.R. Civ. P. 26(b)(3), which essentially codified this Court's decision in *Hickman* v. *Taylor*, 329 U.S. 495 (1947), provides pertinently that:

"(3) *Trial Preparation: Materials*... [A] party may obtain discovery of documents and tangible things... prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

This case presents two important, frequently encountered issues relating to the so-called work product privilege: (a) can a document prepared contemporaneously with and constituting an integral part of the alleged illegality be work product? and (b) is a party entitled, under any circumstances, to an attorney's "mental impressions, conclusions, opinions, or legal theories"?

The first issue is closely connected to the crime-fraud exception to the attorney-client privilege discussed *supra*. Public policy does not permit the shielding of communications reflecting an attorney's complicity in wrongful activity; no different result should obtain where the attorney's conduct is unilateral (*i.e.* work product), as opposed to bilateral (*i.e.* a communication).

The District Court held that the August 26, 1975 letter from Robinson's attorney to AGH

"threatened legal action in the event Robinson was not satisfied in his attempt to file an application for membership on AGH's medical staff and document [Nos. 2-5 were] prepared in response to that letter and in anticipation of trial."[9]

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[9]As set forth at pp. 3-4, *supra*, this letter was written only after Robinson's attempts to obtain an application had been frustrated, but before his submission of the application, various committee reviews, his administrative hearing, or final review by the Board of Trustees.

Such an expansive theory of work product: (a) leads to the inherently inconsistent and untenable conclusion that every document prepared subsequent to the letter (including the Departmental Director's report, the report of the Credentials Committee, and literally thousands of pages of other documents)[10] was protected; (b) impliedly acknowledges that respondents had no intention to provide a fair and objective review of the Robinson application; and (c) required Robinson to prove a conspiracy in process during a period precisely contemporaneous with that for which the privilege was asserted.

In its traditional form, work product involves the gathering, sifting and/or interpreting of information relating to events which have already transpired. Respondents and their corporate counsel, however, were not interpreting history, but were themselves making it. As observed by Professor Moore:

> "By far the most litigated question as to the scope of discovery under the Federal Rules has to do with the extent to which a party may obtain discovery of information, statements, reports or other documents obtained by his adverseary, *after the facts giving rise to the lawsuit*, and in anticipation of litigation or in preparation for trial." 4 Moore's Federal Practice ¶26.63[1] (Emphasis supplied).

Although disagreeing on the rationale, i.e. the material is either not work product or "good cause" overcomes the privilege, most courts in fact have refused to shield information which is directly at issue in the litigation. See, *e.g. Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926 (N.D. Cal. 1976); *Kearney & Trecker Corp. v. Giddings & Lewis, Inc.*, 296 F. Supp. 979 (E.D. Wisc. 1969); *Kirkland v. Morton Salt Co.*, 46 F.R.D. 28 (N.D. Ga. 1968). Given the frequent tension between the demand of a client and the ethical obligations of his attorney, the issue is one meriting consideration by this Court.

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[10]Respondents selectively produced these documents, obviously concluding that they were non-prejudicial.

The final, but by no means least significant, of the issues presented is whether any showing of need can overcome the work product privilege when applied to an attorney's mental impressions, conclusions, opinions or theories. Recently, in *Upjohn v. United States*, 449 U.S. 383 (1981), while acknowledging an existing conflict among the Courts of Appeal on the issue [citing *In re Grand Jury Proceedings*, 473 F.2d 840, 848 (8th Cir. 1973) (absolutely privileged) and *In re Grand Jury Investigation (Sun)*, 599 F.2d 1224, 1231 (3rd Cir. 1979) (discoverable only in a "rare situation")], this Court stopped short of resolving that conflict, holding that:

> "As Rule 26 and Hickman make clear, such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship.
>
> "While we are not prepared at this juncture to say that such material is always protected by the work product rule, we think a far stronger showing of necessity and unavailability by other means than was made by the government or applied by the magistrate in this case would be necessary to compel disclosure." 449 U.S. at 401-402.

Because of clearly inappropriate standards applied by both the Court of Appeals and the District Court, the case was remanded for further proceedings.

The opportunity bypassed last year in *Upjohn* is presented once again herein, though in a much clearer context. In upholding respondents' claim of work product as to four (4) documents, the District Court held that counsel's mental impressions, opinions and legal theories were absolutely privileged. Robinson submits that any standard, short of this total protection, compels disclosure.

The District Court held that Robinson had failed to establish either the intent or a conspiracy to monopolize or unreasonably to restrain trade. Inherently, proof of these elements embraces mental impressions and thought processes. Unlike the attorney's recording of witnesses' statements, the situation

involved in *Upjohn*, the evidence sought by Robinson is unavailable from another, original source. It is rare for a party to find a single "smoking gun"; to find several would be extraordinary. Presumably, Robinson could have introduced every conceivable "fact" relating to consideration of his application, yet failed to convince the court of respondents' culpable state of mind. Their own words represent the best evidence of this crucial element of the cause of action.

CONCLUSION

For all the reasons described above, a writ of certiorari should issue to review the judgment of the Third Circuit.

Respectfully Submitted,

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